Supreme Court, U.S.
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No. 01 -

In The
Supreme Court of the United States

MICHAEL REEVES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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NOVEMBER 6, 2001

7 ORP

QUESTIONS PRESENTED FOR REVIEW

Whether the Sixth Amendment right of effective assistance of counsel is abridged where the accused's trial attorney conducts no pre-trial investigation, no meaningful conference with his client prior to trial, or no adequate preparation for trial, including no comprehensive interview with the defendant, so that any advice to not testify is devoid of strategy — all resulting in prejudice to the defendant, including, but not limited to, the failure to identify and present exculpatory evidence.

PARTIES OF THE PROCEEDINGS

Counsel for petitioner presents the following list in compliance with United States Supreme Court Rule 14.1.(b):

1. Michael Reeves, an individual, is the only party to this petition; and

2. no nongovernmental corporation is a party in this proceeding.

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The opinion of the court of appeals, App. *infra*, at 20, is reported at 255 F.3d 389 (7th Cir. 2001). The district court opinion, App., *infra*, at 1, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2001. A timely petition for rehearing and petition for rehearing *en banc* was denied on August 8, 2001. App., *infra*, at 34. The jurisdiction of this Court is invoked under 28 U.S.C. § 2255.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article (VI) the Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

28 U.S.C. § 2255 provides as follows:

> A prisoner in custody under sentence of a [district] court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . may move the court which imposed the sentence to

vacate, set aside or correct the sentence.

Unless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds . . . that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the

legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of–

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if movant was prevented from making a motion by such governmental action;

STATEMENT OF THE CASE

Michael Reeves was tried before a jury in the federal district court in Chicago in June 1998, for using the mails in a scheme to defraud his employer, Cherry Communications, Inc. ("CCI"), in violation of 18 U.S.C. § 1341. The indictment alleged that under a fictitious company name he received monies for work on two projects he did not perform or complete, thereby depriving CCI of his honest services by failing to disclose that he had engaged in self-dealing. He was represented at trial by private attorney Christopher Bohlen. The jury found him guilty. Subsequently, in June 1999, Mr. Reeves was sentenced to 24 months imprisonment.

Evidence at Trial

The evidence at Mr. Reeves' trial established that in January 1995, Mr. Reeves was employed by CCI, a small telecommunications company. (Tr. 151-153). Mr. Reeves had been hired as vice-president of engineering. (Tr. 153, 168). It was his responsibility to complete two assignments for CCI: (1) acquire and install equipment to run a switching site, through which CCI could route long-distance calls, and (2) acquire equipment to install a digital alarm system for security at its various installation and switching sites. (Tr. 157-158). CCI's owner, James Elliott, and one of its executives, Michael Dyer, testified that they lacked technical experience, so Mr. Reeves was hired for the job. (Tr. 153). Both testified that they thought Mr.

Reeves had an engineering degree because his resume listed two years at MIT and two years at Florida State University, with a B.S. in electrical engineering. They told others that Mr. Reeves was a "double E from MIT." (Tr. 155, 301).

After Mr. Reeves began his employment, he was required to submit check requisition forms for any equipment, inventory, or supplies he needed to purchase. (Tr. 155-160). Mr. Reeves submitted a requisition form for Mr. Elliott's approval in the amount of $6,627.00 for the purchase of electronic equipment from a company called Electronic Products, 6645 La Pas, Indianapolis, IN 60164. (Tr. 373-375). At the trial, a postal inspector testified that the address did not exist. (Tr. 379). Mr. Elliott claimed he did not know what was being purchased, but that he approved the requisition and authorized a CCI check written to Electronic Products which was deposited into a bank account that had been opened by Mr. Reeves in the name Electronic Renaissance. (Tr. 306).

Later, a second check requisition form was submitted to Mr. Elliott, this time in the amount of $15, 712, requesting payment to Electronic Products. (Tr. 174-177). The receipt which accompanied the request had an address for a Post Office box in Bradley, Illinois, which had been opened by Mr. Reeves. (Tr. 380). Mr. Elliott approved the request and the check was issued and deposited in the Electronic Renaissance bank account. (Tr. 175-177, 222, 309-312). Both of these checks went for installation of switching

equipment at CCI's 600 South Federal Street station in Chicago. (Tr. 158, 161, 253, 302-303, 322).

Messrs. Dyer and Elliott testified that Mr. Reeves had recommended that CCI purchase and install an alarm system for its unmanned switch sites at a cost of $88,000. (Tr. 180-182, 314-315). Mr. Elliott approved the recommendation and asked Mr. Reeves to arrange for a contract with four installment payments which Mr. Reeves agreed to do. (Tr. 182, 315). Mr. Reeves then submitted a check requisition form for the first installment in the name of the vendor Digital Alarm Products. (Tr. 178-180, 220, 313). The request was approved and the check was deposited in Mr. Reeves' Electronic Renaissance account. (Tr. 313-316).

Subsequent to the payment of the first installment, Mr. Reeves' employment at CCI was terminated (Tr. 185-186, 318-320), and, later, a second installment check in the same amount of $22,173 was sent to Digital Alarm Products and deposited in Mr. Reeves' Electronic Renaissance account. (Tr. 187-188, 222, 234) Soon thereafter, a new vice-president of engineering, Robert Carrabis, called Digital Alarm Products to inquire about delivery of the system and recognized Michael Reeves' voice on the answering machine. (Tr. 255). The third and fourth $22,173 installments were never paid on the $88,000 contract.

At trial, Messrs. Elliott and Dyer testified that they did not know that Electronic Products and Digital Alarm Products were owned by Mr. Reeves or that he

was purchasing equipment and alarm products for the switch site from companies he owned and operated. (Tr. 183-185, 187, 319). They testified that they did not know that the monies they paid those companies were going to Mr. Reeves. (Tr. 190). They also testified that they did not know if the switch site at Federal Street was ever installed. (Tr. 171, 221, 306). Messrs. Dyer and Elliott testified that the digital alarm system was never installed. (Tr. 311).

At trial, the government offered evidence that none of Mr. Reeves' business names and companies had been registered with the Illinois or Indiana Secretary of State offices. (Tr. 374-375, 380). The bank records of Electronic Renaissance showed that several checks were written but none directly to any equipment provider, and that one check had been written to Technology Programs for $12,000 and had been deposited in an account opened by Mr. Reeves' wife. (Tr. 176-178, 223, 310, 312). Mr. Reeves' trial attorney Christopher Bohlen called no witnesses at trial, put on no defense case, and Michael Reeves did not testify. It was stipulated that CCI had filed a voluntary bankruptcy petition two years after the events which were the subject of Mr. Reeves' trial.

Evidence at the 2255 Hearing

In July 1999, with new counsel, Michael Reeves filed a 2255 petition (28 U.S.C. § 2255) in the district court claiming that his conviction was obtained in violation of his Sixth Amendment right to the effective

assistance of counsel. (Appendix, *infra*, at 1). After he filed his petition, the district court judge determined that his pleadings were of sufficient merit: (1) to permit the petitioner to remain on bond pending its resolution, (2) to permit new counsel to conduct discovery in this case, (3) to permit a 2255 evidentiary hearing. By April 2000, the district court received affidavits, exhibits and depositions as well as the sworn testimony of Mr. Reeves. (App., *infra*, at 2) Evidence, consisting of exhibits attached to Mr. Reeves' 2255 petition, included reports of an independent investigator and copies of two memoranda that Mr. Reeves had provided to his trial counsel. but which had not been used at the trial, and other documents such as loan applications of Mr. Reeves, the transcript of the original jury trial and the depositions of James Elliott, Michael Dyer, and Mr. Reeves' trial attorney Christopher Bohlen. (App., *infra*, 8-10).

At the actual 2255 hearing, the evidence presented consisted of the testimony of Mr. Reeves. He testified that Mr. Bohlen met with him three times prior to the June 1998 jury trial – in September 1997, in February, and in May of 1998 – in abbreviated meetings of little or no substance. (App., *infra*, at 26). Mr. Bohlen's deposition testimony established that he took no notes and had no recollection of what was said. (App., *infra*, at 26). Mr. Reeves testified that at the first meeting he told Mr. Bohlen to visit the CCI facility on South Federal Street in Chicago because equipment he had purchased and installed was there. Mr. Bohlen confirmed he was told this, but admitted he did not go

there to confirm his client's report. Mr. Reeves also told his Mr. Bohlen that electronic equipment on the $88,000 contract was at his home, but again, Mr. Bohlen neither followed-up nor investigated. Mr. Reeves also told Mr. Bohlen that he had partially performed on the alarm system project by diagraming a plan and assembling parts, which were in his garage, but Mr. Bohlen did not take steps to see or confirm what his client told him. Mr. Reeves testified that he would have finished the $88,000 contract if he had received the final two payments. Rather than investigate, Mr. Bohlen instead required Mr. Reeves to produce documentation which Mr. Reeves lacked. Consequently, Mr. Bohlen did nothing. He neither spoke to nor attempted to interview anyone except his client, who he told not to testify. Mr. Bohlen conducted no investigation prior to trial. (App., *infra*, 26-27).

In support of his specific contention that had his lawyer Mr. Bohlen prepared for trial, it would have made a difference, Mr. Reeves offered reports of a private investigator who verified the installation of equipment at the CCI Federal Street location, plus the existence of electronic alarm parts and equipment in Mr. Reeves' garage at his home. (App., *infra*, at 27). Mr. Reeves also introduced a written memorandum to Michael Dyer, detailing the work he had performed at the time of the $88,000 contract and a letter he had written to James Elliott, stating his intention to continue to complete the project. Mr. Bohlen had been given these documents, Mr. Reeves testified, but they

were not used at trial. Mr. Reeves further testified that he, in fact, had purchased that equipment at Mr. Elliott's direction, with his knowledge, and on behalf of CCI, because the company was experiencing serious financial trouble. Mr. Reeves concluded his testimony by reviewing his professional experience and background: he had 10 years of military service, where he had FBI and top-security clearance, and had worked for several telecommunications companies. (App., *infra*, at 28). In rebuttal, the government elicited Mr. Reeves' admission that he had no documentation, invoices or checks for the equipment he had purchased for CCI and that he had used fictitious addresses on the check requisition forms. The government further offered 404(b) evidence (Federal Rules of Evidence, Rule 404(b)) that in unrelated bank loan applications there existed irregularities with respect to Mr. Reeves' personal income and his employment status, i.e. he had been terminated at CCI. (App., *infra*, at 28).

District Court's Ruling

On September 13, 2000, the district court judge issued a memorandum opinion (App., *infra*, at 1) denying the Mr. Reeves' 2255 petition. The district court addressed the trial lawyer's deficiencies – (1) in failing to conduct a meaningful interview with his client; (2) in failing to interview *any* witnesses before trial; (3) in failing to investigate leads given him by his client Mr. Reeves; (4) in failing to comprehend Mr. Reeves' defense; and (5) in failing to prepare Mr. Reeves to testify, and blindly advising him not to testify –

finding, "His attorney's failure to investigate his client's story cannot be seen to be objectively reasonable trial strategy . . . Bohlen's performance in preparing for this trial [is] dangerously and inexcusably close to the line of ineffective assistance, if not over it. While the law presumes an attorney's competence and reasonableness, I can find no reasonable trial strategy in failing to investigate this case at all." (See App., *infra.*, 13-14).

Ultimately, however, the district court ruled that Mr. Reeves was not prejudiced by his lawyer's incompetence because, based upon the district court's assessment of Mr. Reeves' testimony given in support of his 2255 petition, that Michael Reeves' offered testimony would not have changed the jury's verdict. Given Mr. Reeves' credibility problems, as the judge viewed it, the district court concluded Mr. Reeves' lawyer's incompetence did not rise to the level of constitutionally ineffective assistance of counsel. From that order, Michael Reeves appealed to the United States Seventh Circuit.

Court of Appeals Ruling

The Seventh Circuit addressed Mr. Reeves' central argument that the district court applied the wrong legal standard, i.e. by requiring him to prove that he was actually innocent, by requiring him to prove the verdict would have been different but for his attorney's incompetence; by resting its decision solely on Reeves' credibility, by ruling in pertinent part, as follows: "the very heart of the [district court's] opinion was an

examination of the totality of the evidence." (App., *infra*, at 32). With that, the Seventh Circuit held that the district court's conclusion that its confidence remained, constituted a correct application of the correct legal standard set forth in *Strickland*. The Seventh Circuit thus affirmed the district court by a virtual adoption of the district court judge's assessment of the facts and its misapplication of Sixth Amendment law to Mr. Reeves' 2255 petition.

REASONS FOR GRANTING THE WRIT

In the present case, the petitioner, a business executive, proceeded to jury trial on a mail fraud charge in the federal district court, while represented by a private attorney who only met him for three brief and unproductive meetings prior to trial, in which no real substance was discussed but wherein the petitioner provided exculpatory evidence and testimony to his lawyer, which the attorney completely ignored. Faced at trial with a key government witness, a twice-convicted federal felon, petitioner's trial lawyer took no steps to interview any witnesses nor to investigate, did not prepare for trial, presented virtually no defense and blindly advised the petitioner not to testify (without any awareness of what his client would say if he did take the witness stand). The district court judge and the seventh circuit panel agreed (and the prosecution did not dispute) that petitioner's trial lawyer was, for all intents and purposes, incompetent. Nevertheless, petitioner was denied 2255 relief (28 U.S.C. § 2255),

because – in the district court's view – the petitioner "lacked credibility" at his 2255 hearing and therefore would not have been acquitted at trial despite his lawyer's incompetence. This district court's decision, wrongly affirmed by the seventh circuit panel, misapplied the appropriate legal standard for assessing prejudice set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984) and therefore this petition for a writ of certiorari must be granted.

I

The District Court Wrongfully Applied a Prejudice Standard Greater Than is Required by *Strickland v. Washington* in Denying Petitioner's Section 2255 Petition, Requiring Review and Reversal of the Circuit Court's Decision Affirming the District Court.

In order to fully appreciate the extent and degree of the prejudice to petitioner, his lawyer's incompetence must be reviewed. Trial counsel's deficiencies began with a complete failure to adequately investigate the case, to learn the government's case and petitioner's defense, and to follow leads to evidence (given him by his client prior to trial) which would have permitted him to advance a coherent trial strategy. These initial errors were compounded at the trial where, because of the lack of trial preparation, trial counsel was unable to confront the government witnesses' testimony, offer alternative explanations for the allegations of fraud, present a defense case, offer proof of actual performance of the contracts, or call his own client to the stand at a

trial (which was, at best, a swearing contest between Michael Reeves and James Elliott, his employer and key government witness). These types of deficiencies were more than adequate to satisfy the first prong of *Strickland* was satisfied. See, *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (the failure to conduct a reasonable investigation undermines the adversary process and constitutes ineffective assistance of counsel); *Clay v. Director*, 749 F.2d 427, 431-32 (7th Cir. 1984) (reversing a conviction where the defendant's trial counsel had valid defenses to present to the charges and trial counsel advised defendant to plead guilty and failed to file notice of appeal) (citing cases in which defendant was permitted to withdraw guilty plea where defenses exist which were "worthy of consideration by a factfinder" but were not presented); *Gray v. Director*, 721 F.2d 586, 595-98 (7th Cir. 1984) (attorney acting under a conflict with co-defendant did not pursue cooperation of one client or a valid defense of coercion against other represented client rendered constitutionally ineffective assistance of counsel); *Montgomery v. Petersen*, 846 F.2d 407, 412 (7th Cir. 1988) ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *Sullivan v. Fairman*, 819 F.2d 1382, 1392 (7th Cir. 1987) (trial counsel must conduct a reasonable investigation of the government's evidence).

This Court has explored the contours of prejudice in ineffective assistance claims. In *Williams*, this Court rejected a decision of the Virginia Supreme Court to

add a third requirement that a petitioner must demonstrate deprivation of "fundamental fairness." This Court held that the Virginia Supreme Court had erred (1) in requiring anything more than proof that the outcome would have been different, and (2) by failing to "evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). This Court noted that the Virginia Supreme Court failed to give appropriate weight to the impact the presence of additional mitigating evidence might have had on a reasonable jury in the context of "the entire post-conviction record, viewed as a whole and cumulative of mitigation evidence presented originally." This Court held that where a petitioner can demonstrate that the outcome of the proceeding reasonably could have been affected, he has demonstrated a deprivation of his Sixth Amendment right.

This Court's decision in *Strickler* provides guidance on the meaning of the prejudice prong term "reasonable probability." In *Strickler* this Court explained the meaning of 'reasonable': "the question is not whether the defendant would be more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (quoting *Kyles v. Whitley*, 514 U.S. 419, 433 (2000)). Thus, the reviewing court is not simply to determine "whether, after discounting the inculpatory

evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Strickler v. Greene*, 527 U.S. 263,289-91 (1999)).

Thus, the petitioner does not have to demonstrate actual innocence in order to prevail on an ineffective assistance claim. *Strickland*; *Sullivan v. Fairman*, 819 F.2d 1382, 1392 (7th Cir. 1987). And, the petitioner does not have to establish that his counsel's deficient performance would more likely than not have altered the outcome of the case. Rather, it is sufficient to generate a significant possibility that the outcome would have been different except for the unprofessional errors of counsel. *Strickler*, 527 U.S. at 298 (Souter, J., concurring). This Court has held that the petitioner raising an ineffective assistance claim does not have to establish either his factual innocence or the likelihood of success at a new trial by a preponderance, or any other, standard. The district court's insistence on addressing the question of whether the result would have "been the same" or produced a "different result" means, in this case, that Mr. Reeves' claim was subjected to a standard of prejudice significantly higher than is required by the Sixth Amendment. The district court's failure to employ the correct legal standard requires a reversal. See *Williams* (the Virginia Supreme Court rendered a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" when it

subjected petitioner's claim to a higher prejudice test than required by *Strickland*, mandating reversal); *Glover*, 121 S.Ct. at 701 (reversing Seventh Circuit requirement of additional prejudice showing on *Strickland* error).

II

The Seventh Circuit Decision Allowed the District Court to Subject Petitioner's Claims to a Standard Higher than Required by the Constitution.

The Circuit Court's decision contravened this Court's requirements when it did not require that the district court assess prejudice in the manner required by *Strickland*. In case after case, this Court has required as a threshold that a 2255 petitioner establish a reasonable probability that the errors of trial counsel impacted the reliability of the jury's determination. *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). Here, the district court did not use a substitute definition such as is contained in *Strickler v. Greene*, 527 U.S. 263, 289-91 (1999), that reasonable probability means a "substantial possibility" that the outcome would be different.

Not only did the district court never once cite to the correct legal definition and standard of prejudice, the district court's conclusions regarding the showing of prejudice never expressed its analysis in terms of having its confidence undermined or not undermined by the newly discovered errors. Indeed, throughout its

discussion of prejudice, the district court drew a great number of conclusions about the evidence presented and the testimony of petitioner; yet never once did it state its confidence in the outcome was not undermined. Instead, the district court judge concluded that based on its subjective view of the quality of the testimony of Michael Reeves, and his exhibits submitted as corroboration, his testimony evidence failed to demonstrate that it "would have changed the verdict." Notwithstanding this clear holding by the district court, the Circuit Court rejected petitioner's argument stating that the "very heart of the district court's opinion was an examination of the totality of the evidence to determine whether the court's confidence was undermined by the new evidence." (See App., *infra.*, 32).

By looking at the "heart" of the district court's opinion's rather than its actual written words, the Circuit Court provided only insight into its own mind – for there is no textual support for the conclusion the Circuit Court reached. The Circuit Court decision cited to no portion of the district court's opinion to support its conclusion. It cited to no finding of the district court, no specific conclusion regarding any evidence, and no other written statement of the district court's opinion to support its conclusion that the correct standard was applied. In reaching the conclusion that the district court applied the correct standard, the Circuit Court relied on what the district court "must have" concluded. The actual language of the district court's opinion, however, was not one of "undermining

confidence" or "substantial possibilities" the verdict would be different, but instead was of "changing the verdict." For the district court ultimately to conclude, as it did, that "Reeves deserved much better lawyering than he received, but that in the end, the result inevitably would have been the same," required the district court to ask not if there existed confidence in the outcome of the circumstantial case of fraud advanced by the government, but rather has petitioner proven that he is innocent.

It is precisely that standard which is contrary to *Strickland* and its progeny and which set the bar at a higher level than is required by this Court and the Constitution. It is precisely for that reason, then, that Michael Reeves' Section 2255 ineffective assistance claim has been subjected to the wrong standard by the Circuit Court – out of conformity with the other claims considered by this Court – and why the Circuit Court's decision must be reviewed and reversed.

III

The Seventh Circuit Decision Was Contrary to Strickland Because It Did Not Consider the Trial Errors in the Context of the Totality of the Evidence.

The Circuit Court erred in failing to analyze the new evidence and the impact of the trial counsel's errors against the totality of the evidence introduced at trial. "In making this determination [whether a reasonable probability exists] a court hearing an ineffectiveness

claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695; *Strickler*, 527 U.S. at 289-91("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence;" the court is not to determine "whether, after discounting the inculpatory evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."); *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000). "In order to determine if particular testimony might reasonably have lead to a different result at trial, as *Strickland* requires, the district court must consider the strength of the offered testimony relative to the strength of the State's case." *Lawrence v. Armontrout*, 31 F.3d 662, 667 (8th Cir. 1994)(goal of judge reviewing claim "is not to predict hypothetical outcome" of future trial).

By failing to apply the foregoing standard to Mr. Reeves' case, the central error of the Circuit Court was that it did not analyze counsel's errors in the context of the evidence at trial and the totality of the facts. At the onset, the Circuit Court did not even address (1) the weakness of the government's case, resting as it did on two simple inferences of fraud from alleged nonperformance of the Federal Street contract and alleged non-disclosure of self dealing; (2) the impact on

that weak case that the evidence of performance of the Federal Street contract would have had; and (3) the impact on that weak case that evidence of full disclosure of self-dealing would have had. The Circuit Court did not discuss at all the evidence of full performance of the Federal Street contract. This unrebutted 2255 evidence was powerfully exculpatory and proved an absence of fraudulent intent and eliminated the first major premise of the government's fraud theory. Nor did the Circuit Court address the evidence that Mr. Reeves told Mr. Elliott that the companies through which he was obtaining the equipment were his own companies and that Elliott had not only approved of such an arrangement, but had expressly requested and authorized it. A jury inclined to believe petitioner on this point would render the second major premise of the government's fraud case non-existent. Thus, with such evidence before the jury, the government's fraud theory would be completely undermined.

The Circuit Court failed to discuss how the contemporaneously written memoranda demonstrating performance on both the Federal Street contract and the Digital Alarm contract not only *fully corroborated* Mr. Reeves' testimony (thus making it more likely it would be believed) but *completely undermined* contrary testimony of Elliott and the government's theory of fraud (thus making it less likely to be believed). A faithful adherence to the requirements of *Strickland* by the district court and by the Circuit Court would have at least required a consideration of those additional facts and their impact on the totality of the evidence.

See *United States v. Morrison*, 946 F.2d 484, 500 (7th Cir. 1991)("whether such a reasonable probability exists [i.e., that counsel's performance affected the outcome of the trial] depends, of course, on the nature and strength of the government's case against him and the nature of his attorney's failures.").

Instead of engaging in an analysis of the impact of the trial counsel's errors in failing to present this evidence and establish before the trial jury these points, the Circuit Court simply concluded, paralleling the district court's failings, that the evidence [Mr. Reeves' attorney failed to present] would have had no impact on the jury's determination. To reach that conclusion, the Circuit Court made the erroneous claim that the credibility contest was *not* a one-on-one contest, i.e. Mr. Reeves vs. Mr. Elliott. Yet, the record establishes that in every relevant sense – that is, in the sense of whether Elliott knew that Mr. Reeves was self-dealing (the government's very theory of fraud) – the contest was solely between the twice-convicted CEO of the company and petitioner Mr. Reeves. Credible evidence that Elliott not only knew that Mr. Reeves was dealing through his own company but actually encouraged it because of his own bankruptcy problems, evidence provided directly through Mr. Reeves' testimony and circumstantially through the approved invoices, Mr. Reeves' history of dealing in the same company names and the contemporaneously prepared memoranda, meant that Elliott's denials were squarely met. Resolution of this contest depended solely on who the jury believed: Mr. Reeves or Mr. Elliott. No other

person was privy to the conversations between them and no other person had direct knowledge, or would even be in a position to know whether such a fact was true or not.

The Circuit Court's characterization of the government's case as a documentary case shows that the appeals court miscomprehended both the evidence at trial and the government's fraud theory. Claimed corroboration from other employees merely reflected their lack of knowledge of a fraud: neither Mr. Dyer nor Ms. Marks-Pozniak could corroborate either side, because neither was present during the discussions between Mr. Reeves and Mr. Elliott. Moreover, the documentary evidence at trial did not establish that either Mr. Reeves' or Mr. Elliott's version was true or not true; it simply showed requisition checks applied for by Mr. Reeves for equipment to be purchased by companies he owned or controlled which were then signed off and approved by Mr. Elliott. Did Mr. Elliott know that these companies were Mr. Reeves' when he signed off on the acquisitions? Mr. Elliott said no, Mr. Reeves said yes. The documents themselves, bearing both of their signatures and involvement, shed no light on that question.

Moreover, the newly presented memoranda, written by Mr. Reeves, do not show that Mr. Reeves was "covering up what he was or was not doing during his employ at CCI" as the court concluded. They are significant because they set forth contemporaneously with his employment at CCI that he had performed the

work he claimed he performed then, the very work he claimed he performed at trial, the work he established through his independent investigator that he had in fact performed, and, *contrary to the government witnesses,* the work they claimed he had not performed. What additional evidence could be more devastating to a government's fraud theory based on the failure to perform work than evidence, from testimonial, documentary, and physical inspection, which showed that the work had in fact been performed. Yet the Circuit Court's discussion (either accepting or rejecting it) of the impact of this evidence on the government's fraud theory is absent.

It has been held that where credibility between witnesses is crucial, the failure of trial counsel to make a reasonable investigation and to present evidence is squarely prejudicial under *Strickland.* See, *Washington v. Smith,* 219 F.3d 620, 634 (7th Cir. 2000) (independent evidence can tip balance in the case by "providing substance and credibility" to defense); *Montgomery v. Petersen,* 846 F.2d 407, 414-15 (7th Cir. 1988) (where "jury was presented with a straightforward credibility choice" every piece of corroborating evidence becomes "extremely significant"). This application of the *Strickland* prejudice test is directly applicable here. Yet, there is again no discussion of the closeness of the evidence, a fact squarely acknowledged by the district court but ignored entirely by the Circuit Court, or the impact of this additional evidence on the totality of the circumstances. That approach is inconsistent with the

manner in which *Strickland* requires ineffective assistance claims to be assessed and the standard which this Court traditionally and routinely applies to ineffectiveness claims. See, *Williams v. Washington*, 59 F.3d 673, 679 (7th Cir. 1995)("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

IV

The Circuit Court's Decision Inappropriately Assessed the Credibility of Reeves' Testimony Against Him in Rejecting His Petition.

Finally, in affirming the denial of Petitioner Reeves' Section 2255 petition, the Circuit Court adopted the district court's negative assessment of Mr. Reeves' hearing testimony, finding it not credible. In so doing, the Circuit Court specially contravened the *Strickland* standard by not considering the totality of the circumstances in cases where credibility of the witnesses is crucial as noted above. But above and beyond that failing, the Circuit Court contravened *Strickland* by *resolving* the credibility contest rather than inquiring whether a jury confronted with the contradictory evidence could have rendered a different verdict. Ultimately, both the district court and Circuit Court panel usurped the jury's function, by disallowing any analysis of whether absent the attorney's deficiencies the verdict, or outcome, would have been affected. Clearly it would have been. The process was indeed undermined by counsel's failures and 2255 relief

should have been given.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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